

FACTUAL HISTORY

On July 20, 2011 appellant, then a 57-year-old inventory management specialist, filed a claim alleging that he sustained a bilateral hearing loss as a result of work-related noise exposure.

In a letter dated July 26, 2011, OWCP advised appellant that he should submit factual and medical evidence in support of his claim establishing a rationalized medical report including a causal relationship between his federal employment and a diagnosed condition.

Appellant submitted reports of audiograms performed at the employing establishment dated June 7, 1983 through June 29, 2010. In an August 20, 2009 report, Dr. Tilford B. Bowlan, an employing establishment physician, diagnosed bilateral sensorineural hearing loss, which he opined was probably not related to noise exposure.²

In an undated statement, appellant related that he was subjected to loud noise for eight hours a day when he worked in the machine shop. He was exposed to noise from metal cutting saws, sanders, pneumatic chisels, rivet guns, compressors, blowers, diesel-powered forklifts and high-pitched test equipment.

OWCP referred appellant, together with the case record and a statement of accepted facts, to Dr. Gregg S. Govett, a Board-certified otolaryngologist, for examination and a second opinion. On September 13, 2011 Dr. Govett reported appellant's history and complaints and listed findings on examination and testing. A September 13, 2011 audiogram showed hearing thresholds of 20, 20, 25 and 75 decibels on the left and 30, 20, 40 and 75 decibels on the right at 500, 1,000, 2,000 and 3,000 cycles per second. Dr. Govett diagnosed bilateral sensorineural hearing loss. He noted that appellant had a preexisting hearing loss that was not due to factors of his federal employment because the loss was not greater than what would be predicated on the basis of presbycusis.

On September 21, 2011 OWCP accepted the claim for the condition of bilateral sensorineural hearing loss.

On September 21, 2011 OWCP asked a district medical adviser for his review and an opinion as to whether appellant had a work-related hearing loss and, if so, to address any permanent impairment related to such loss. In a September 22, 2011 report, Dr. H. Mobley, a district medical adviser, agreed that appellant's current hearing loss was no greater than what would be expected from presbycusis, based on the June 3, 1983 baseline audiogram. He concluded that appellant's hearing loss was not related to his federal employment. The medical adviser also concluded that the audiogram revealed a 17 percent binaural hearing loss.

On September 29, 2011 OWCP proposed to rescind its acceptance of appellant's claim. It stated that the claim had been accepted in error as the evidence did not establish that his

² An August 20, 2009 audiogram obtained at work showed hearing thresholds of 15, 5, 15 and 70 decibels on the left and 20, 10, 35 and 70 decibels on the right at 500, 1,000, 2,000 and 3,000 cycles per second.

hearing loss was causally related to the accepted work exposure. Appellant was given 30 days to present evidence and argument in support of his claim.

On November 9, 2011 appellant requested a schedule award.

By decision dated November 21, 2011, OWCP rescinded its acceptance of appellant's claim on the grounds that the acceptance was erroneous. The medical evidence failed to establish a causal relationship between his hearing loss and established noise exposure.

In a separate decision dated November 21, 2011, OWCP denied appellant's request for a schedule award.

By letter dated January 24, 2012, appellant requested reconsideration. He contended that the employing establishment should have informed him that he had a preexisting hearing loss and that he should have worked in a protected area.

In a February 22, 2012 decision, OWCP denied appellant's request for reconsideration, finding that he did not raise any substantive legal questions or include new and relevant evidence warranting a merit review of his claim.

LEGAL PRECEDENT -- ISSUE 1

The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under section 8128(a) of FECA and, where supported by the evidence, to set aside or modify a prior decision and issue a new decision.³ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can be set aside only in the manner provided by the compensation statute.⁴

It is well established that once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where, as here, OWCP later decides that it has erroneously accepted a claim for compensation.⁵ In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.⁶

ANALYSIS -- ISSUE 1

Following its acceptance of appellant's claim, OWCP forwarded the case record to Dr. Mobley, a district medical adviser, for review and an opinion as to whether appellant had a work-related hearing loss. After reviewing the entire record, including the second opinion report of Dr. Govett, Dr. Mobley agreed that appellant's current hearing loss was no greater

³ *Eli Jacobs*, 32 ECAB 1147 (1981); *see* 5 U.S.C. § 8128(a).

⁴ *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

⁵ *See* 20 C.F.R. § 10.610 (1999).

⁶ *James C. Bury*, Docket No. 03-596 (issued April 24, 2003).

than what would be expected from presbycusis, based on the June 3, 1983 baseline audiogram. He found there was no causal relationship between the accepted occupational exposure and appellant's diagnosed hearing loss. The Board finds that Dr. Mobley's opinion, which supports that of Dr. Govett, constitutes probative medical evidence and is sufficiently convincing to discharge OWCP's burden of proof to support rescinding its acceptance of appellant's claim.

The Board notes that the record does not contain any other medical opinion supporting an employment-related hearing loss. As noted, Dr. Govett determined that there was no causal relationship between appellant's hearing loss and his work activities. On August 20, 2009 an employing establishment physician diagnosed bilateral sensorineural hearing loss, which he stated was probably not related to noise exposure. There is no medical evidence of record containing an opinion supporting appellant's claim. The weight of the medical evidence supports that appellant's bilateral ear condition is not causally related to his accepted noise exposure. The Board will affirm OWCP's November 22, 2011 decision denying benefits.

On appeal, appellant contends that his claim should be approved because he had no hearing loss prior to his federal employment. Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease was caused or aggravated by employment factors or incidents, is sufficient to establish a causal relationship.⁷

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128 of FECA,⁸ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁹ To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁰ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 2

OWCP denied appellant's request for further reconsideration on the merits of his claim on the grounds that he failed to submit any evidence or argument to warrant a merit review. The

⁷ *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Dennis M. Mascarenas*, 49 ECAB 215 (1997).

⁸ 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at anytime on his own motion or on application. *Id.* at § 8128(a).

⁹ 20 C.F.R. § 10.606(b)(1)-(2).

¹⁰ *Id.* at § 10.607(a).

record reflects that he submitted no evidence or argument to OWCP subsequent to the November 22, 2011 merit decision on his claim.

Although timely filed, appellant's January 24, 2012 application for reconsideration did not set forth any argument or contain evidence that either: (1) showed that OWCP erroneously applied or interpreted a specific point of law; (2) advanced a relevant legal argument not previously considered by OWCP; or (3) constituted relevant and pertinent new evidence not previously considered by OWCP.¹¹ Because he failed to meet any of these standards, OWCP properly denied the application for reconsideration without reopening the case for a review on the merits.¹²

LEGAL PRECEDENT -- ISSUE 3

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.¹³

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.¹⁴ FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.¹⁵ The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.¹⁶ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.¹⁷

ANALYSIS -- ISSUE 3

On September 29, 2011 OWCP rescinded its acceptance of appellant's hearing loss claim. Therefore, there are no accepted conditions in this case. The Board finds that appellant did not establish that he sustained permanent impairment of his hearing causally related to an

¹¹ *Id.* at § 10.606.

¹² *Id.* at § 10.608; *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

¹³ *P.W.*, Docket No. 11-1122 (issued December 22, 2011); *Veronica Williams*, 56 ECAB 367 (2005).

¹⁴ 5 U.S.C. § 8107.

¹⁵ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁶ 20 C.F.R. § 10.404.

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

accepted condition.¹⁸ Therefore, appellant did not meet his burden of proof and OWCP properly denied his claim for a schedule award.¹⁹

CONCLUSION

The Board finds that OWCP has met its burden of proof to rescind acceptance of appellant's claim. The Board further finds that he is not entitled to a schedule award for his hearing loss. The Board also finds that OWCP did not abuse its discretion in denying further merit review.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 22, 2012 and November 22, 2011 are affirmed.

Issued: June 24, 2013
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ See note 13 and accompanying text.

¹⁹ See *A.S.*, Docket No. 11-2097 (issued May 11, 2012) (where the Board found that the claimant did not establish that he sustained permanent impairment to the upper extremities based on the accepted conditions).